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No. 82-167

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, ET AL.,
Petitioners,

v.

VERNON WALLACE, ET AL.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NAVAL RESERVE ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* NAVAL RESERVE ASSOCIATION IN SUPPORT OF PETITIONERS

The Naval Reserve Association, with the consent of the parties, submits this brief, *amicus curiae*, in support of reversal of the decision of the court of appeals below.

INTEREST OF THE *AMICUS CURIAE*

The Naval Reserve Association ("NRA") is a national organization consisting of approximately 23,000 members, most of whom are members of the United States Naval Reserve. The NRA is a national educational and professional organization of officers joined together to support the navy and to provide services to naval reserve officers. The NRA was established in 1954 in recognition

of the need of an organization devoted solely to service to the navy, naval reserve, and naval reserve officers.

The major objective of the NRA is to cooperate with the naval establishment in the solution of the many and complex problems which necessarily arise in the administration of a navy composed of both regular career and reserve personnel. The association supports the navy in performing its role in the national defense of the United States and measures the success of its actions by the yardstick of patriotism rather than self-interest.

In pursuit of its objectives, the association provides the Congress with its consolidated opinion on legislative matters, and provides the Department of the Navy and Department of Defense with its opinion on defense matters. The NRA also supports local reserve commands in the accomplishment of training programs and supports the Naval Reserve Officer Training Corps program in colleges throughout the country.

The NRA and its members have a clear interest in whether this Court will permit servicemen to hold their military superiors personally liable in money damages for violations of constitutional rights. Members of the NRA are subject to being called to active duty, and many attend weekly drills and active duty training sessions each year. At all times, the rules, regulations, procedures and laws that affect those on active duty also affect those in the Naval Reserve. The NRA and its members are therefore intimately affected by the outcome of this matter.

SUMMARY OF ARGUMENT

Presented for decision is a case in which the important goals of adequate protection of individual constitutional rights and preservation of an effective, efficient national

defense are potentially at odds. The plaintiffs are members of the armed forces. The defendants are their military superiors, either senior enlisted men or officers. By this action the plaintiffs assert the right to hold their military superiors individually liable in damages for alleged violations of their equal protection rights under the Fifth Amendment to the United States Constitution. Specifically, the plaintiffs allege that solely because of their race, they were assigned the least desirable duties, excluded from training programs, given low performance evaluations, and punished with unusual severity for minor transgressions.

The precedential basis of plaintiffs' claims is rooted in this Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which this Court held that, under appropriate circumstances, an action for damages would lie against individuals, who, under color of federal authority, violated the plaintiffs' constitutional rights. Since then the existence and extent of this remedy's availability has sharply divided the Court. Nonetheless, the cases are in agreement that, at a minimum, where Congress has provided a substitute remedial framework, and where special factors counsel hesitation, the remedy should not be permitted. *See Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979); *Butz* v. *Economou*, 438 U.S. 478 (1978).

The decision of the court of appeals below unnecessarily set in conflict the legitimate interests of the military in the integrity of its chain of command with the remedial framework for servicemen whose constitutional rights have been infringed by their superiors. It ignored altogether the substantial question of whether a damage action against military superiors ought to be available to

servicemen in a *Bivens* context. Instead, it assumed the existence of such a right, and held that if administrative remedies are exhausted by the plaintiff, and if the subject matter of the suit was amenable to judicial review, the only issue remaining was the extent of immunity, if any, available to the military superiors.

The decision of the court below relegates to secondary status the importance of the remedial measures deemed appropriate by Congress and the executive long before the advent of *Bivens*. The remedial measures in place provide a broad-ranging framework within which a serviceman may seek redress for wrongs committed by his military superiors.

By necessity, a military commander's authority over subordinates is extensive. To guard against the potential for abuse of that authority, and at the same time bolster the efficacy of the military chain of command, a comprehensive remedial system was devised whereby the armed forces themselves are empowered to provide any remedy necessary to correct an injustice. This remedial framework recognizes the importance of guaranteeing the lawful and proper treatment of service members. At the same time it enhances their willingness to support the decisions of command by insuring that the miscreant superior's wrongdoing will be remedied, in turn, by his own superiors. Further, a denial of the available remedies by the services is frequently subject to judicial review, thus guaranteeing that, when all else fails, resort to the courts will not be denied. *U.S. ex rel. Berry* v. *Commanding General*, 411 F.2d 822, 825 (5th Cir. 1969); *Casey* v. *Schlesinger*, 382 F.Supp. 1218 (N.D. Ok. 1974); *Baxter* v. *Claytor*, 652 F.2d 181 (D.C. Cir. 1981).

The carefully drawn remedies established by Congress and the executive, essential to the proper functioning of our military forces, has been subverted by the decision of the court of appeals below. By subjecting military commanders to the substantial expenditure of time and their personal funds in defending such suits, along with the inescapable fear of being held liable in damages, the legitimate decisions of military commanders cannot help but be tempered. Further, the potentiality for abuse of the judicial system by the disgruntled service members cannot be ignored. Cognizant of his ability to force his superiors to justify their decisions in court, a serviceman's respect for, and adherence to, legitimate military orders could not help but be lessened.

The decision of the United States Court of Appeals for the Ninth Circuit emasculates the constraints placed upon the implication of a damages remedy against officials for constitutional violations. The decisions of this Court properly limit the availability of such actions to situations in which an alternative remedial framework has not been established or where legitimate governmental concerns will not be thwarted if such a remedy is permitted. Both of those factors weigh against the implication of a *Bivens* remedy under the circumstances of this case.

ARGUMENT

I

WHERE A SUBSTITUTE, ADEQUATE REMEDIAL FRAMEWORK IS AVAILABLE OR WHERE SPECIAL FACTORS COUNSEL HESITATION, A *BIVENS* REMEDY SHOULD NOT BE IMPLIED.

In the now-famous case of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court created a right of suit for damages

against individual federal officials whose actions exceed the bounds of constitutional constraints upon the government. The defendants in that case were federal narcotics agents alleged to have violated the plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures. In deciding the case the Court looked to determine the power of the federal courts to grant a damages remedy against the individual govermental official under the circumstances. It concluded that where the subject matter of the suit was within the general jurisdiction of the federal courts, as was the Fourth Amendment, "federal courts may use any available remedy to make good the wrong done." *Id.* at 396 [citation omitted]. Nonetheless, while the damages remedy was made available under those circumstances, the decision stopped far short of ruling that it would be made available whenever anyone alleged a violation of his constitutional rights by a federal official.

Specifically, the Court extensively discussed the absence of any effective, alternative remedy available to the plaintiff. "For people in Bivens' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring). Further, the Court noted that the case involved "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. It is under those circumstances, and those constraints, that the Court determined the appropriateness of according the damages remedy sought.

These same factors, variously articulated, have been the framework within which this Court has made the "principled choices among traditional judicial remedies" necessary when confronted with a violation of an individual's constitutional rights. *Id.* at fn. 8 (Harlan, J., concurring). Thus, in *Butz* v. *Economou*, 438 U.S. 478,

513-15 (1978), it was held that the importance of preserving the independent judgment of administrative law judges and prosecutors accorded them absolute immunity from damages liability, particularly in view of the existing, adequate remedial framework available to a defendant in an administrative proceeding.[1] Similarly, in *Davis* v. *Passman*, 422 U.S. 228, 245 (1979), the Court adopted wholecloth the same considerations in determining the availability of a damages remedy in favor of a female congressional administrative assistant who claimed she was terminated from employment on account of her sex in violation of the Fifth Amendment. In reaching its conclusion in that case, the Court extensively discussed the unavailability of any other remedy should the claim be denied, and noted the absence of any special concerns counselling hesitation in employing the remedy. Finally, these same determinants of the availability of a damages action against individual federal officials received express attention in *Carlson* v. *Green*, 446 U.S. 14 (1980). There the court held that the availability of a damages remedy against a federal official for violations of constitutional rights was conditioned upon the absence of special factors

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[1] The *Butz* Court analyzed the issue under the rubric of the availability of an absolute immunity in favor of the governmental officials. The distinction is largely procedural. If the absence of "special factors" and the absence of an alternative remedy are preconditions to the existence of a claim for damages, the burden is on the plaintiff to establish their absence. If, instead, they are elements of the affirmative defense of absolute immunity, the burden is on the defendant. In any event, under the circumstances of this case, where both the alternative remedies and the "special factors" are proper subjects of judicial notice under Rule 201, Fed. R. Evid., the distinction is largely academic.

counselling hesitation in according such a right, and the absence of a substitute remedy for recovery directly under the Constitution.

In the context of suits by servicemen against their military superiors, the considerations addressed by this Court in its previous decisions dictate a denial of a *Bivens* remedy. An express, and necessarily exclusive, remedial framework has been provided to servicemen to redress wrongs by their superiors, including wrongs of constitutional dimensions. This, coupled with the clear need of our armed forces to maintain effective discipline and respect for military superiors, militates strongly against the availability of a *Bivens* action by a serviceman against his military superiors. It is to these points that this argument now turns.

II
THE EXISTING REMEDIES AVAILABLE TO SERVICEMEN ARE EXCLUSIVE.

Long before the advent of the *Bivens* remedy, Congress adopted the remedial measures it deemed appropriate for wrongful acts by military superiors against their subordinates. The remedies provided are both consistent with the maintenance of military discipline and adequate to provide the needed protection to members of the armed forces. Additionally, the legislatively enacted remedies have been supplemented by an entire panoply of administrative remedies established by the Departments of Defense and the Navy to compliment the statutory remedies. Further, since the advent of *Bivens*, Congress has faced, and expressly rejected, the opportunity to adopt further remedies. These facts compel the conclusion that Congress intended the existing remedial framework to be exclusive. Accordingly, the implication of a *Bivens* remedy is inappropriate.

In 1950, Congress enacted Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938. That statute provides that "any member of the armed forces who believes himself wronged by his commanding officer" may file a complaint with superior military authorities who are then directed to "examine into the complaint and take proper measures for redressing the wrong complained of." The power of the services to take any necessary measures to correct a wrongful act by a commanding officer is virtually plenary under this section.

The use of Article 138 to correct the specific wrongs complained of by the present plaintiffs is expressly authorized. The United States Navy Equal Opportunity Manual, OPNAV Instruction 5354.1A, lists the Article 138 complaint of wrongs as one of the measures by which a member of the armed forces may seek redress for discriminatory acts. Furthermore, Appendix A to Chapter 4 of the instruction directs commanders to inform an individual complaining of unlawful discrimination of his right to initiate a complaint under Article 138 if the results of the commander's investigation pursuant to the instruction are deemed unsatisfactory by the complainant.

The proceedings under Article 138 are subject to review up the chain of command to the Secretary of the Navy. They have frequently been reviewed by the federal courts when a remedy has been arbitrarily denied. *Adkins* v. *U.S. Navy*, 507 F.Supp. 891, 898 (S.D. Texas 1981); *Casey* v. *Schlesinger*, 382 F.Supp. 1218, 1219 (N.D. Ok. 1974); *Smith* v. *Resor*, 406 F.2d 141, 147 (2d Cir. 1969); *United States ex rel. Berry* v. *Commanding General*, 411 F.2d 1822, 825 (5th Cir. 1969).

The procedures for redress of discrimination complaints permitted by Article 138 date back to the Articles of War, adopted in 1920 as 10 U.S.C. § 1593. They have

remained in force since that time and, even alone, would provide adequate protection of individuals' constitutional rights.

Despite the broad relief available under Article 138, it is but one part of an entire remedial network available to the service member to redress grievances, including those of discrimination under the Fifth Amendment to the United States Constitution. The Board for Correction of Naval Records, established by 10 U.S.C. § 1552, has unlimited powers to correct any military record where necessary to "correct an error or remove an injustice." *Id.* The Board consists of civilian employees of the executive who hold hearings to consider the requests of service members for redress. The statute was enacted in 1956; however, similar provisions have been in effect since 1951. The power of the Board for Correction of Naval Records to remedy wrongs is expansive. Virtually all of the claims presented by the plaintiffs in this case are capable of remedy by resort to the Board. Thus, the Board may correct a service member's record to reflect a promotion unjustly denied, and may even provide back pay, *Caddington* v. *U.S.*, 178 F.Supp. 604, 147 Ct. Cl. 629 (1959); *Gearinger* v. *U.S.*, 412 F.2d 862, 188 Ct. Cl. 512 (1969); *Skinner* v. *U.S.*, 594 F.2d 824 (1979); may correct unjustly disfavorable performance evaluations, *Guy* v. *U.S.*, 608 F.2d 867 (1979); and may even remove all record of an unjustly imposed punishment, *Baxter* v. *Claytor*, 652 F.2d 181 (D.C. Cir. 1981); *Davies* v. *Resor*, 455 F.2d 1331 (1st Cir. 1971). Furthermore, as with proceedings under Article 138 of the Uniform Code of Military Justice, the proceedings of the Board for Correction of Naval Records are reviewable by the courts. *Horn* v. *Schlesinger*, 514 F.2d 549 (8th Cir. 1975); *Storey* v. *U.S.*, 531 F.2d 985, 209 Ct. Cl. 174 (1976).

Under § 1106 of the U.S. Navy Regulations, a service member may submit a complaint, parallel in the scope and effectiveness to that provided under Article 138 of the Uniform Code of Military Justice, complaining of any wrongful act on the part of any other member of the military. Complementary to Article 138, this provision permits an aggrieved service member to complain of any superior's conduct, not just his commanding officer's.

Part of the plaintiff's claims in this case concerns the administration of unusually severe punishment for minor offenses. Such punishment is imposed pursuant to Article 15 of the Uniform Code of Military Justice, 10 U.S.C. § 815. Subsection (e) of that section provides that any person punished unjustly, or in a manner disproportionate to the offense, may appeal the imposition of punishment up the chain of command. Furthermore, punishments imposed under this section are reviewable by the Board for Correction of Naval Records, as discussed above.

Finally, a commander who violates his subordinates' constitutional rights is subject to severe disciplinary measures. Under Article 92 of the Uniform Code of Military Justice, a member who violates the orders of superior authority, including standing orders prohibiting the commission of discriminatory acts, may be punished by courts-martial. 10 U.S.C. § 892. This same conduct is proscribed by Article 93, which prohibits the maltreatment of any subordinate. 10 U.S.C. § 893. These measures provide appropriate and adequate deterrents, while at the same time rendering the commander accountable to his superiors. Thus, the desired result is achieved within the proper framework of military discipline.

Each of these remedial devices was enacted by Congress prior to the *Bivens* decision. Had Congress desired,

it could have provided a direct action against the offending superior to insure the protection of the serviceman's rights. For obvious reasons, it was deemed inappropriate to do so.

More importantly, each of these remedial measures adequately protects the service member's rights in a manner which supports, rather than subverts, the chain of military authority. It is well recognized that military superiors possess wide authority over their subordinates. Having imbued these superiors with such authority, it was right and proper that Congress, at the same time, provide remedial mechanisms whereby the armed forces assume responsibility for abuses of the authority it had granted. The procedures outlined above do precisely that. They support the chain of command because they provide for the correction of wrongs by the superiors of the offending official. These individuals are in a prime position to take effective action, are knowledgeable of the structure of the armed forces, and possess a unique interest in insuring that servicemen's rights are adequately protected. These long-standing mechanisms *are* the remedy provided by Congress. They should not be lightly cast aside, nor circumvented by the implication of an unneeded and unwarranted right to pursue individuals for claims of damages.

III
THE NINTH CIRCUIT'S DECISION INADEQUATELY ACCOUNTS FOR THE UNIQUE NEEDS OF THE ARMED FORCES.

The decision of the court of appeals below considered the impact of their decision permitting service members to hold their military superiors personally liable in damages as a factor bearing upon, the "reviewability" of the case, and the degree of immunity to be accorded the de-

fendant. The consequence of this approach was to downplay the significance of military considerations in reaching an appropriate decision.

The proper framework for analysis is to consider whether the impact of implying a *Bivens* remedy in favor of military subordinates against their superiors is a special factor which counsels hesitation in according such a right. The Ninth Circuit's characterization of the issue as a determinant of reviewability posed the wrong question. Reviewability, as a judicial doctrine, is principally an analysis of the ability of the courts to competently determine the issue confronting them. *Baker* v. *Carr*, 369 U.S. 186 (1962). While the courts may well be competent to determine many issues involving alleged violations of the constitutional rights of service members by their superiors, it may nonetheless be inadvisable for the courts to do so because of the impact of such decisions upon the disciplinary framework of the military.[2]

Similarly, the Ninth Circuit's analysis of what it termed the "immunity" of the military superior was inadequate. The court held that "[o]nce a claim has been found reviewable, allowing a damages remedy would not exacerbate either the disruption or the usurpation [of military functions]." *Wallace* v. *Chappell*, 661 F.2d 729, at n.9 (9th Cir. 1981). Thus, it considered that the reviewability question was determinative of the availability

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[2] This is not to say that reviewability is not a factor to be considered in any claim involving military decisions. As the court below properly noted, claims involving the exercise of military discretion or expertise may well be incapable of adequate determination by a court of law. Such factors may well limit the ability of the court to adequately decide a given claim regardless of the basis for suit.

of a damages remedy. The only exceptions acknowledged by the court below "might relate to military officials who perform functions analogous to those of judges and prosecutors," and "decisions made in a combat setting." *Id.* at n.10.

The court concluded that only a qualified immunity was warranted. In addition to the fact that the court adopted an improper standard in arriving at the determination, it cannot escape notice that the according of a qualified immunity in the context of an equal protection claim was a meaningless gesture. The Fifth Amendment protects only against arbitrary or invidious discrimination. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). Consequently, for the plaintiff to make out his claim, he must establish the bad faith of the defendant. To say, as did the court below, that the defendant military superiors would be adequately protected by according them an affirmative defense of qualified immunity is pointless in this context.

Furthermore, the Ninth Circuit's conclusion that the courts would be perfectly capable of dealing with nonmeritorious claims through the device of the motion for summary judgment is, at best, suspect. The state of mind of the defendant is always an element in a suit claiming a violation of an individual's equal protection rights. Under these circumstances, summary judgment will rarely be appropriate since a factual issue will almost always exist. *Imbler* v. *Pachtman*, 424 U.S. 409, 419 n.13 (1976). Consequently, the decision of the Ninth Circuit below will, in most instances, force military superiors to defend through trial any allegations of their subordinates which can be framed in a constitutional context.

The military decisions before the court today involve matters of assignments and discipline which must be made by military commanders on a day-to-day basis. The

disturbing impact of the Ninth Circuit's decision is the adverse effect on military decisions that is inescapable in the face of the consequences to the individual commander should a serviceman suspect improper motives in arriving at a decision. The commander ordering unpleasant or hazardous duty assignments, conducting simple inspections or imposing military discipline could not help but be hesitant in the face of the prospect of having to personally defend against, and possibly pay damages to, the disgruntled serviceman. Further, those same disgruntled service members would feel freer to second guess their superiors' commands knowing that they could force them to justify military decisions in court. The service members' respect for, and adherence to, legitimate military orders could not help but be lessened. These prospects pose serious disruption upon military discipline and a concomitant dimunition of our national security.

This Court has long recognized the importance of military discipline and the military chain of command to the defense of the United States. The best known of the cases is *Feres* v. *United States*, 340 U.S. 135 (1950). There the Court decided that the Federal Tort Claims Act did not permit suits by military members arising out of, or incident to, military service. The basis for the *Feres* doctrine is the "peculiar relationship of the soldier to his superior" and "the extreme results that might obtain" on military discipline should intra-military tort litigation be permitted. *United States* v. *Brown*, 348 U.S. 110, 112 (1954). *See also, United States* v. *Muniz*, 374 U.S. 150, 162 (1967); *Stencel Aero Engineering Group* v. *United States*, 431 U.S. 666, 671-672 (1977). These same considerations have permeated virtually every decision

rendered by this Court concerning the conduct of business by the military.

> No question can be left open as to the right to command in the officer or the duty of obedience in the soldier.

In re Grimley, 137 U.S. 147, 153 (1890).

Whether or not the courts have chosen to accord review to a given issue involving military matters, it is clear that the impact of such questions has been of paramount concern in the decision-making process. In the context of the personal liability of individual commanders, these considerations must, at a minimum, be considered "special factors counselling hesitation." *Carlson* v. *Green*, 446 U.S. 14, 18 (1980). It is quite apparent that these factors counselled hesitation in the remedies accorded by Congress to aggrieved service members. None of those remedies included the availability of an individual suit against the offending service member, and the adoption of a remedial framework supportive of the military chain of authority indicates a Congressional desire to effectuate that end. In the face of these constraints, this Court should not accord the remedies sought. Congress has spoken. It has placed on paper the remedies it deems appropriate in the face of the special concerns this Court has recognized as a limitation on the availability of a direct suit under the Constitution for damages against an offending official. The wisdom of Congress should not be second-guessed.

CONCLUSION

For each of the foregoing reasons, *amicus curiae* Naval Reserve Association urges that this Court reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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